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No. 01-584

IN THE
Supreme Court of the United States

WANDA ADAMS, LEO L. FLOYD, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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ON WRIT OF CERTIORARI TO THE
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BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA), founded in 1985, is a voluntary organization of over 3,500 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters.

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amicus curiae* National Employment Lawyers Association (NELA) states that no counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court in which NELA has participated as *amicus curiae* are: *Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133 (2000), *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

NELA members represent many of the individuals who bring claims under the federal civil rights statutes, including the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq*., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. NELA members see firsthand the harmful effects of discrimination on ordinary workers. Those devastating effects occur regardless of whether the employer acted intentionally or unintentionally or whether the discrimination is overt or subtle, explicit or neutral, conscious or subconscious. Indeed, the most pernicious and invidious forms of discrimination are the most subtle and unintentional acts, which warrant a strong response if age discrimination is ever to be eliminated.

The disparate impact method of proving discrimination is that effective response. Disparate impact theory provides an important mechanism for policing arbitrary practices and stereotypes, which is critical to achieving the goals of the Age Discrimination in Employment Act.

SUMMARY OF ARGUMENT

The ADEA's prohibitions broadly define discrimination by tracking the language of Title VII's prohibitions. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). There is no dispute that Title VII prohibits discrimination in facially neutral practices that have a disparate impact on members of a protected class. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Since the statutory prohibitions are *in para materia*, the ADEA should be interpreted similarly to Title VII to permit proof of discrimination using the disparate impact method. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

The real issue is the appropriate defense to a claim that a facially neutral policy has a disparate impact based on age. NELA maintains that the ADEA's provision "reasonable factors other than age," 29 U.S.C. § 623(f)(1) (RFOA), establishes the substantive and procedural response to a disparate impact claim under the ADEA. The specific language of the RFOA "to take any action otherwise prohibited" together with "factors other than age" presumes that a violation of ADEA Section 4(a) has been established due to the adverse effects on age of a neutral employment practice. The language as well as the placement of the RFOA with the affirmative defenses in ADEA Section 4(f)(1), 29 U.S.C. §623(f)(1), strongly supports the conclusion that the RFOA is an affirmative defense on which the employer bears the burden of proof.

The ADEA's defenses provide the proper standards for determining which discrimination is arbitrary and unlawful and which discrimination is justified, as Congress confirmed in the 1990 amendments to the ADEA.[2/] Rejecting the reasoning and holding in *Public Employees Retirement System v. Betts*, 492

[2/] Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, §§ 101-03 (1990) (hereinafter "OWBPA").

U.S. 158 (1989), Congress made clear that it was improper to restrict the ADEA's prohibitions by a narrow view of "arbitrary discrimination" or by the statute's defenses.[3] Adherence to Congress' directives leads to the conclusion that the ADEA prohibits discrimination in facially neutral practices, with the RFOA defense determining whether such discrimination is arbitrary or may be excused.

Interpreting the ADEA to cover disparate impact claims with the RFOA as an affirmative defense to such claims is further supported by regulations issued just days after the Act took effect in 1968. *See* 33 Fed. Reg. 9172 (June 21, 1968). The Department of Labor regulations, 29 C.F.R. §§ 860.103-104 (1970), interpreting ADEA Sections 4(a) and 4(f)(1) are entirely consistent with the statute and its legislative history. The regulations should be given considerable weight in interpreting the statute given their issuance so close in time to the implementation of the statute, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and their issuance by the same administration that drafted the legislation and the report documenting the problems of age discrimination in both facially discriminatory and facially neutral practices. *See Zubar v. Allen*, 396 U.S. 168, 192 (1969).

ARGUMENT

I. DISPARATE IMPACT CLAIMS EFFECTIVELY POLICE ARBITRARY DISCRIMINATION.

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[3] *See* S. Rep. No. 101-263, at 17-18 (1990), *reprinted in* 1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT OF 1990, at 336-37 (1990); H.R. Rep. No. 101-664, at 33-34 (1990), *reprinted in* 1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT OF 1990, at 240-41 (1990) (hereinafter "OWBPA LEG. HIST.").

The disparate impact method of proof serves the important purpose of removing "artificial, arbitrary, and unnecessary barriers to employment," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), that may be linked to protected status.[4] Disparate impact theory ferrets out purportedly neutral standards that operate as the functional equivalent of overtly discriminatory classifications.[5] Allowing plaintiffs to prove discrimination using the disparate impact method further helps "police" "subconscious stereotypes and prejudices," because a "facially neutral practice adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). Finally, disparate impact theory provides an important alternative to disparate treatment because evidence of discriminatory motive is often rare and elusive.[6]

It is well established that the "ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357-58 (1995). Indeed, the substantive prohibitions of ADEA § 4(a), 29 U.S.C.

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[4] Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLORIDA L. REV. 229, 317 (1990).

[5] *Id.* at 318.

[6] "Many policies whose very intent is to discriminate are framed in a race-neutral manner. It is often difficult to obtain direct evidence of this motivating animus.... As I have said before: 'Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.' *Washington v. Davis*, 426 U.S. 229, 253 (1976)." *Alexander v. Sandoval*, 121 S. Ct. 1511, 1530, n. 13 (2001) (Stevens, J., dissenting).

§ 623(a), were derived *in haec verba* from Title VII.[7/] Interpretations of the substantive provisions of Title VII apply with "equal force" to the ADEA's substantive prohibitions. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Thus, courts have consistently and uniformly applied the same method of proof developed for Title VII disparate treatment cases to ADEA cases. *See Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133, 142 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

Despite the parallel purposes and almost identical prohibitions of the ADEA and Title VII,[8/] the court below and other courts have held that the ADEA does not permit the disparate impact method of proving discrimination by showing that a facially neutral policy had a disproportionate effect on

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7/ *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978) ("There are important similarities between the two statutes, to be sure, both in their aims — the elimination of discrimination from the workplace — and in their substantive prohibitions.") (Footnote quoting 42 U.S.C. § 2000e-2(a)(1) and 29 U.S.C. § 623(a)(1) and citing the comparison between 42 U.S.C. § 2000e-2(a)(2) and 29 U.S.C. §623(a)(2).).

8/ The only difference in the language of the prohibitions (other than the ADEA's use of the term "age") is that Title VII § 703(a)(2), 42 U.S.C. §2000e-2(a)(2), was amended. in 1972 to add the term "applicants." Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972). *Compare* 42 U.S.C. § 2000e-2(a)(1) and 29 U.S.C. § 623(a)(1) and 42 U.S.C. § 2000e-2(a)(2) and 29 U.S.C. § 623(a)(2). The difference should be inconsequential, since the Court construed Title VII § 703(a)(2) to apply to applicants in *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-27 & n. 1 (1971), prior to the addition of the term "applicants" to Title VII in 1972.

age.[9/] The premier reason relied upon by the court below and other courts is the presence of the "reasonable factors other than age" provision in ADEA § 4(f)(1), 29 U.S.C. §623(f)(1) (hereinafter RFOA),[10/] which Title VII does not contain.[11/] These courts effectively read the RFOA defense as limiting the prohibitions in ADEA § 4(a), 29 U.S.C. §623(a), to intentional discrimination.[12/]

The court below and other courts rejecting disparate impact as a method of proof for ADEA claims make several fundamental errors. First, they do not give effect to the specific language or context of the ADEA's defense for "reasonable factors other than age." 29 U.S.C. § 623(f)(1). NELA's brief focuses exclusively on the RFOA defense and submits that the RFOA provides the appropriate affirmative defense to a disparate impact claim under the ADEA.

Second, these courts erroneously take a narrow view of "arbitrary discrimination" by ignoring Title VII case law and the ADEA's legislative history that "arbitrary discrimination" encompasses facially neutral policies, unintentional

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9/ *See Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325-26 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999); *Ellis v. United Air Lines Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995); *EEOC v. Frances W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994).

10/ *Id.*

11/ Title VII incorporates from the Equal Pay Act a defense that permits wage differentials based on a "any other factor other than sex." 29 U.S.C. § 206(d)(1) (2000).

12/ *Mullin v. Raytheon Co.*, 164 F.3d 696, 702-03 (1st Cir. 1999); *EEOC v. Frances W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994).

discrimination, and subconscious stereotyping. NELA endorses the amicus brief of AARP which provides ample support from the legislative history of the ADEA and literature on stereotyping that the ADEA's prohibitions and purposes were designed to reach discrimination in all of its forms.

Given the parallelism of the ADEA's prohibitions and purposes to Title VII, ADEA Section 4(a)(2) should be interpreted like Title VII to permit disparate impact claims when a facially neutral practice adversely affects older workers based on age. The differences in the defenses of the ADEA and Title VII do not change the meaning or scope of the definition of discrimination and the types of claims that can be raised under the prohibitions.

The real issue is not whether the ADEA permits disparate impact claims, but what is the appropriate defense to such a claim under the ADEA, to which we now turn.

II. THE REASONABLE FACTORS DEFENSE IN ADEA SECTION 4(f)(1) ESTABLISHES THE PROCEDURAL AND SUBSTANTIVE RESPONSE TO FACIALLY NEUTRAL POLICIES THAT DISCRIMINATE IN VIOLATION OF ADEA § 4(a).

Section 4(f)(1) of the ADEA states:

"It shall not be unlawful for an employer, employment agency, or labor organization ---

(1) *to take any action otherwise prohibited* under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or *where the differentiation is based on reasonable factors other than age*....

29 U.S.C. § 623(f)(1) (2000) (emphasis added) (RFOA).

The RFOA defense in the ADEA has remained unchanged since the 1967 enactment of the statute. There is virtually no legislative history explaining the provision[13] and a dearth of case law closely examining it.[14]

While the RFOA provision has not been the subject of much litigation, it has generated considerable confusion among the courts. Some courts view the provision as the same as a "legitimate, nondiscriminatory reason,"[15] which is the employer's response in a case of circumstantial proof of disparate treatment under the model of proof developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Employers have asserted the provision as a defense to discriminatory policies, whether the policies used age explicitly[16] or implicitly.[17]

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[13] Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U.L. Rev. 155, 193 (1986).

[14] In *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408-09, n.10 (1985), the Court granted certiorari to consider the burden of proof applicable to the RFOA provision, but declined to reach the issue. Judicial analysis of the RFOA defense by the lower courts has been sketchy and mixed. 2 HOWARD C. EGLIT, AGE DISCRIMINATION §5.15 (2d ed. 1995).

[15] Eglit, *supra* note 14, § 5.19, at 5-73, n. 334 (collecting cases).

[16] *See EEOC v. Massachusetts*, 987 F.2d 64, 73 (1st Cir. 1993) (physical exam at age 70 not a RFOA).

[17] *See EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 (9th Cir. 1992)(rejecting RFOA defense to union hiring hall policy that required retirees to cease receiving pensions, since pension receipt was conditioned on age).

The plain meaning of, context of, and contemporaneous regulations interpreting the RFOA provision strongly support construing the provision as an affirmative defense to a claim that "factors other than age" led to discrimination because of age in violation of ADEA § 4(a), 29 U.S.C. § 623(a).

A. Reading the Language "Any Action Otherwise Prohibited" and "Factors Other Than Age" Together Connotes an Affirmative Defense to a Claim of Discrimination From a Non-Age or Neutral Factor.

The prefatory language of the RFOA provision "to take any action otherwise prohibited" clearly signifies an "affirmative defense."[18] The condition precedent to the affirmative defense is the establishment of a violation of the statute's prohibitions, specifically ADEA §§ 4(a), (b), (c), or (e), 29 U.S.C. §§ 623(a), (b), (c), or (e). The "factor other than" criterion of the defense connotes that the violation involves a non-age factor that causes discrimination because of age, which is precisely a claim of disparate impact. The RFOA defense fits as the statutory response to a claim that a neutral employment practice or policy adversely affected older individuals because of age in violation of the ADEA's prohibitions, 29 U.S.C. §§ 623(a), (b), (c), or (e).

1. The Prefatory Language "Any Action Otherwise Prohibited" Creates an Affirmative Defense to a Violation of ADEA § 4(a), 29 U.S.C. §623(a).

The RFOA begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. §623(f)(1). This prefatory phrase means that the RFOA does not come into play until a violation of an ADEA prohibition has been established. When a party seeks to have a violation excused by asserting an exception to liability, that party typically bears the burden of

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[18] 1 OWBPA LEG. HIST., at 253, 348.

proving that its conduct falls within the exception. *See United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967).

Congress clearly views the prefatory language "to take any action otherwise prohibited" as creating an affirmative defense. Based on its understanding of this proviso, Congress added this very language to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), in the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 103(1) (1990), to clearly make ADEA § 4(f)(2) an affirmative defense.[19]

Prior to 1990, ADEA § 4(f)(2) did not include the proviso language from ADEA §4(f)(1). ADEA § 4(f)(2) stated:

> It shall not be unlawful for an employer, employment agency, or labor organization ... to observe the terms of a bona fide seniority system or any bona fide employee benefit plan... which is not a subterfuge to evade the purposes of this Act....

29 U.S.C. §623(f)(2) (1989).

The OWBPA's amendment to ADEA § 4(f)(2), 29 U.S.C. §623(f)(2), adding the proviso from its sister provision, §4(f)(1), 29 U.S.C.§ 623(f)(1), is important because it reflects Congress' understanding of the meaning and effect of a key phrase in § 4(f)(1). Congress used the proviso language from § 4(f)(1) to make unmistakably clear that the addition of this language to § 4(f)(2) imposed two conditions: (1) the condition precedent of a violation of § 4(a), and (2) the employer bore the burden of establishing the elements of the defense.[20] In so

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[19] *Id.*

[20] *See* S. Rep. No. 101-263, at 29-30 (1990), *reprinted in* 1 OWBPA LEG. HIST. at 348-49; H.R. Rep. No. 101-664 (1990), at 46-47, *reprinted in* 1 OWBPA LEG. HIST., at 253-54.

doing, Congress confirmed its understanding that the prefatory language in § 4(f)(1) had the same effect.[21/]

The OWBPA amendments to the ADEA further signify Congress' view of the proper analysis to apply in construing the ADEA's defenses related to the Act's prohibitions and purposes. The amendments demonstrate congressional intent to broadly define discrimination in the ADEA's prohibitions and to use the Act's defenses to set the standards for determining when that discrimination is arbitrary and unlawful or may be excused.

In enacting the OWBPA, Congress expressly disagreed with this Court's reasoning and conclusion in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 181 (1989), that ADEA § 4(f)(2) merely redefined the conduct prohibited by ADEA § 4(a). In *Betts*, the Court interpreted the employee benefit plan provision in ADEA § 4(f)(2) to "redefine[] the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act." 492 U.S. at 181. The Court reached this conclusion based on the language of § 4(f)(2) under which a bona fide employee benefit plan could not be a "subterfuge to evade the purposes of the Act." 29 U.S.C. § 623(f)(2) (1989). Focusing on the ADEA's purpose to prohibit arbitrary discrimination, the Court reasoned that discrimination in employee benefits was not the type of arbitrary discrimination that was intended to be covered in the general prohibitions of ADEA § 4(a).

Congress emphasized that the Court's analysis and interpretation of the ADEA's purpose, prohibition, and defense

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21/ In passing the OWBPA, Congress also expressed its approval of the circuit court decisions and the EEOC's regulations concluding that the 'reasonable factors other than age' exception included in section 4(f)(1) was an affirmative defense for which the employer bears the burden of proof. *Id.*

were, with all due respect, incorrect. The OWBPA "explicitly and completely rejects both the reasoning and the holding in *Betts*." 1 OWBPA LEG. HIST., at 20 (Statement of Managers Explaining the Bill). The OWBPA rejected a narrow reading of the ADEA's purpose to prohibit "arbitrary discrimination"as a basis for restricting the reach of the ADEA's prohibitions. Congress confirmed that the "ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits."*Id.*

The OWBPA also provides clear congressional confirmation that the ADEA's prohibitions are to be interpreted "like the comparable provisions of Title VII" because the ADEA's prohibitions were taken *in haec verba* from Title VII. H.R. Rep. No. 101-664, at 33 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240 (1990). To reinforce the continued parallelism between the ADEA's prohibitions and Title VII's prohibitions, Congress deliberately did not amend ADEA § 4(a) in 1990. *Id.* Instead, to correct the Court's holding that § 4(a) did not cover discrimination in employee benefits, Congress added a definitional provision to include employee benefits within the meaning of the § 4(a) phrase "compensation, terms, conditions, or privileges of employment." Pub. L. No. 101-433, § § 102 (1990), codified at 29 U.S.C. §630(l).

To correct the Court's reasoning and holding that discrimination in employee benefits was not arbitrary, Congress amended the ADEA's defense for employee benefit plans, 29 U.S.C. §623(f)(2)(B) (2000), not the ADEA's prohibitions. The defense defines the circumstances under which an employer could justify age discrimination in employee benefits. *See* S. Rep. No. 101-263, at 17-18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 336-37 (1990); H.R. Rep. No. 101-664, at 33-34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240-41 (1990). In amending ADEA § 4(f)(2), Congress emphasized that the defense "provides a sound mechanism for harmonizing two purposes of the ADEA ...: eradicating arbitrary discrimination based on age and promoting the hiring of older persons." *Id.*

Finally, the OWBPA overturns the Court's conclusion that ADEA § 4(f)(2), 29 U.S.C. §623(f)(2), was a definitional provision and not a defense, by explicitly imposing the burden of proof on the employer to establish the elements of § 4(f)(2). Pub. L. No. 101-433, § 103 (1990), codified as 29 U.S.C. §623(f)(2). In *Betts*, the Court reasoned that the seniority system provision in ADEA § 4(f)(2), like the seniority system provision in Title VII §703(h), 42 U.S.C. §2000e-2(h), was a definitional provision and not an affirmative defense. *Betts*, 492 U.S. at 181-82. The OWBPA specifically overturns this reasoning by reiterating that all of the defenses in ADEA §4(f)(2) are true affirmative defenses on which the employer bears the burden of persuasion to establish the elements of the defense. *See S.1511 Final Substitute: Statement of Managers*, 1 OWBPA LEG. HIST., at 25 (1990).[22/]

The prefatory language of ADEA § 4(f)(1) belies a construction that the RFOA provision merely defines the statute's prohibitions. Congress clearly views the proviso "to take action otherwise prohibited" as establishing an affirmative defense to a violation of Section 4(a). The placement of the RFOA defense contiguous with the other defenses in ADEA §4(f) further demonstrates congressional intent that the RFOA provision operates as an affirmative defense.

[22/] The versions of the OWBPA prior to final passage included ADEA §§ 4(f)(1) and (3) and specifically imposed the burden of proof for ADEA § 4(f)(1) on the employer. *See* S. Rep. No. 101-263, at 2 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 321 (1990); H.R. Rep. No. 101-664, at 3 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 210 (1990). The final Statement of Managers deletes reference to ADEA §§ 4(f)(1) and (3) from the bills because the *Betts* decision did not interpret those provisions. *See S.1511 Final Substitute: Statement of Managers*, *id.* at 25.

2. The Placement of the RFOA Contiguous to the ADEA's Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). The RFOA provision of the ADEA is sandwiched between the bona fide occupational qualification provision and the foreign workplace provision. This Court has repeatedly held that the BFOQ provision is an affirmative defense. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985). The foreign workplace provision has also been recognized as an affirmative defense.[23/] The juxtaposition of the RFOA provision with these other affirmative defenses certainly suggests that it too is an affirmative defense.

The BFOQ and RFOA provisions have been juxtaposed to each other from the earliest drafts of the ADEA proposed by the Johnson Administration.[24/] Their contiguous relationship is no

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[23/] The foreign workplace defense was added to the ADEA in 1984 by § 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792. *See Mahoney v. Radio Free Europe/Radio Liberty, Inc.*, 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense). *See also* Eglit, AGE DISCRIMINATION, § 5.61 at 5-276 (2d ed. 1995).

[24/] *See* H.R. 90-13054 & S. 90-830 (1967), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 94 & 127.

accident, and implies that the defenses were joined together to be interpreted similarly.[25]

The first part of ADEA § 4(f)(1) provides an affirmative defense to classifications that are facially discriminatory. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985). The action "otherwise prohibited" by § 4(a) is explicit from the use of age in the terms of the policy or practice. *Id.* The BFOQ defense in § 4(f)(1) provides the appropriate response to intentional discrimination because the employer admits it used age as a qualification, but seeks to justify its action by showing that the use of age as a criterion is bona fide and reasonably necessary to the operation of the business. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411 (1985).

The "reasonable factors other than age" defense provides the second part of ADEA Section 4(f)(1). Again, the prefatory language requires that an action violating § 4(a) has been established. The language in the RFOA provision "factor other than age" connotes that the second part of ADEA Section 4(f)(1) responds to classifications that are facially neutral, for facially discriminatory policies are addressed by the BFOQ provision. The placement and context of the RFOA provision clearly supports reading the provision as a defense to facially neutral actions that violate ADEA § 4(a).

3. The RFOA Defense Does Not Operate as a Denial of An Intent to Discriminate.

A denial that an action was motivated by age responds to a claim that the employment action was motivated by age. A simple denial of discrimination is the appropriate response to a prima facie claim of intentional discrimination under the *McDonnell Douglas* model of proof. *See McDonnell Douglas*

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[25] *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995).

Corp. v. Green, 411 U.S. 792 (1973). Response by denial means that the plaintiff's evidence does not establish an action "otherwise prohibited" by § 4(a), since a prima facie case based on circumstantial evidence merely raises an inference of discrimination that does not shift the burden of proof to the employer. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

In contrast, the RFOA defense does not logically or structurally operate as a denial of intentional discrimination.[26] None of the language in ADEA § 4(f)(1), 29 U.S.C. §623(f)(1), suggests that the provision includes or responds to an element of intent to discriminate. Rather by asserting the RFOA, the employer admits that the action taken would otherwise constitute a violation of § 4(a) as the prefatory language of §4(f)(1) states. The employer seeks to justify the discrimination, however, by establishing the two elements of the RFOA provision, reasonableness and that the action was based on an age-neutral factor.

Not only does the language of ADEA § 4(f)(1) clearly preclude reading the provision as a mere denial to a claim of disparate treatment, but such a reading of the provision would render it superfluous. There would be no need for the statute to spell out a denial to a prima facie claim of disparate treatment. Such a construction violates the cardinal principle to give meaning to a provision that does not render it redundant or superfluous. *Kungys v. United States*, 485 U.S. 759, 778 (1988) ("No provision should be construed to be entirely redundant.")

When proof of intent to discriminate is part of a claim or its corresponding defense, Congress clearly includes language

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[26] *See* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 832-33 (1997).

imposing this requirement. Again, the OWBPA amendments to ADEA § 4(f)(2) are instructive. Prior to the OWBPA, the defenses for bona fide seniority systems and employee benefit plans in ADEA § 4(f)(2), contained the phrase "subterfuge to evade the purposes of this Act." 29 U.S.C. § 623(f)(2) (1989). In *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), the Court interpreted this phrase as requiring evidence of an intent to discriminate.[27] The OWBPA amendments removed the phrase "subterfuge to evade the purposes" from ADEA §4(f)(2).[28]

The ADEA's defense for employee benefit plans is now a clear, objective showing of increased cost, without any inquiry into the intent of the employer. 29 U.S.C. § 623(f)(2)(B)(i) (2000).[29] In contrast, Congress inserted the words "not intended to evade the purposes of this Act" into the bona fide seniority system defense in the OWBPA amendments to ADEA §4(f)(2)(A), 29 U.S.C. §623(f)(2)(A) (2000).

This deliberate exclusion of language requiring evidence of intent in subpart B of § 4(f)(2), and inclusion in subpart A, demonstrates that Congress acts purposefully to impose the elements of intent or compliance with the purposes of the Act in the ADEA's defenses. *See Russello v. United States*, 464 U.S. 16, 23 (1983) *(quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("[W]here Congress includes particular language in one section of a statute but omits it in

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[27] Congress overturned the *McMann* decision in the 1978 amendments to the ADEA, Pub. L. No. 95-256, § 2(a), 92. Stat 189, and expressly disagreed with the "holding and reasoning" of the case. H.R. Conf. Rep. No. 95-950, at 8 (1978).

[28] S. Rep. No. 101-263, at 18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 337 (1990); H.R. Rep. No. 101-664, at 34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 241 (1990).

[29] *Id.*

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") The absence of language in ADEA Section 4(f)(1) of an intent requirement or an element related to the purposes of the ADEA strongly suggests that Congress drafted the provision to avoid any inquiry into these elements in establishing the RFOA defense.

B. This Court's Analysis of the Equal Pay Act Supports A Claim of Disparate Impact Under the ADEA.

The second major flaw in many of the lower court decisions is their reliance on the Equal Pay Act's defense for "any other factor other than sex," 29 U.S.C. § 206(d)(1) (2000), as support for rejecting disparate impact in ADEA cases. NELA submits that the EPA defense actually support the opposite conclusion — that the "factor other than" language responds to a claim of disparate impact.

In *Corning Glass Works v. Brennan*, 417 U.S. 188, 204 & 209 (1974), the Court explicitly recognized that the EPA's "any other factor other than sex" provision would be an appropriate defense to a facially neutral practice or policy such as a pay differential for night shift work. In the EPA context, the "factor other than" means that the factor is not sex-based. The identical "factor other than" language in the RFOA defense should be similarly construed to apply to factors that are not age-based. *See, e.g., Northcross v. Memphis Board of Education*, 412 U.S. 427, 428 (1973).

The structure of the EPA's defense incorporated into Title VII further supports a plausible interpretation that the ADEA's recognizes disparate impact claims.[30] In *County of Washington*

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[30] Mack A. Player, *Wards Cove Packing or Not Wards Cove*

(continued...)

v. Gunther, 452 U.S. 161, 170 (1981), the Court reiterated that Title VII applies to sex-neutral systems that have an adverse impact on sex and not to just sex-motivated decisions.[31] In holding that the EPA "factor other than sex" defense was incorporated into Title VII, the Court acknowledged that the defense could apply to claims under Title VII that sex-neutral compensation systems were discriminatory.[32]

The Court's analysis in *Gunther* provides meaning to a statutory defense by reading it in context with the prohibitions to which it applies. Similarly, interpreting the RFOA provision to respond to claims that age-neutral policies violate ADEA Section 4(a) if they have a disparate impact on age, gives meaning to the phrase "factors other than age" in ADEA Section 4(f)(1).

The language "factor other than" does not make the defense implicit in or subsumed by the general prohibitions of the statute. This Court explicitly rejected the argument that the "any other factor other than sex" defense of the Equal Pay Act,[33] was implicit in Title VII's general prohibitions of discrimination "because of sex." *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981). *Gunther* reasoned that construing the "factor other than" defense as implicit in the Act's prohibitions would make it superfluous.

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[30](...continued)
Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act," 31 U. RICH. L. REV.819, 833-35 (1997).

[31] *Id.*

[32] *Id.*

[33] 29 U.S.C. § 206(d)(1) (2000).

The lower courts relying on *Gunther* to reject disparate impact claims under the ADEA further err in reading *Gunther* as holding that the "any other factor other than sex" defense under the EPA, 29 U.S.C. § 206(d)(1), precludes disparate impact claims for sex-based wage discrimination. [34] They use this purported holding of *Gunther* to conclude that similar language in the ADEA precludes disparate impact claims for age discrimination.[35]

To reach this conclusion, these courts first ignore the very clear and contrary reasoning in *Corning Glass Works v. Brennan*, 417 U.S. 188, 204-05, & 209 (1974), applying the "factor other than sex" defense to a facially neutral policy. Second, a close examination of *Gunther* yields no such holding at all. Third, their conclusion reveals a fundamental misunderstanding of the EPA and a significant difference between the EPA, Title VII, and the ADEA — no proof of intent or impact is needed to show a violation of the EPA.

In *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), the Court held that a prima facie violation of the EPA is established by an objective standard of unequal pay for equal work. The circuit courts have recognized the EPA as a form of "strict liability" statute under which the employer has the burden to prove one of the EPA's affirmative defenses once the plaintiff shows a pay disparity.[36] No proof of discriminatory

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[34] *Id.*

[35] *Id.*

[36] *See Miranda v. B&B Cash Grocery Store*, 975 F.2d 1518, 1533 (11th Cir. 1992). *See also Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n. 5 (7th Cir. 1985); *Strecker v. Grand Forks County Social Servs. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980).

intent is needed to show a pay disparity in violation of the Equal Pay Act.[37]

While there are similarities in the ADEA's RFOA defense and the EPA's factor other than sex defense, there is also a critical difference. The language of ADEA § 4(f)(1) expressly requires the employer to show that the factor other than age is "reasonable," as discussed below.

C. The Term "Reasonable Factor" in ADEA Section 4(f)(1) Requires The Employer to Show That the Age-Neutral Factor is Job-Related.

The language of ADEA Section 4(f)(1), 29 U.S.C. §623(f)(1), requires that the "factors other than age" must be "reasonable." Neither the statute nor its legislative history provide a definition of the term "reasonable."[38] The term "reasonable" must be given effect, however. *See United States v. Menasche*, 348 U.S. 528, 539-40 (1955) (court's duty to give effect to every clause and word of a statute "rather than to emasculate an entire section.") It cannot be ignored as the courts rejecting disparate impact theory under the ADEA have done.[39]

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[37] *Id. See also* Nina Joan Kimball, *Not Just Any 'Factor Other Than Sex': An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 319 n. 10 (1984).

[38] *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995).

[39] *See Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *Ellis v. United Air Lines Inc.*, 73 F.3d 999 (10th Cir. 1996); *EEOC v. Frances W. Parker School*, 41 F.3d 1073 (7th Cir. 1994).

Black's defines "reasonable" as "fair, proper, just, moderate, or suitable under the circumstances." BLACK'S LAW DICTIONARY1138 (5th ed. 1979). This simple definition of reasonable makes the RFOA defense different in type and degree from the employer's response of a legitimate, nondiscriminatory reason to a claim of disparate treatment. "Legitimate" is defined as "lawful" or "real, valid or genuine." BLACK'S LAW DICTIONARY 811 (5th ed. 1979). Applying the Court's reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), legitimate in this context simply means not prohibited by the ADEA. Thus, an employer can rely on an unreasonable or illegal reason as a response to a disparate treatment claim, as long as the reason is "wholly motivated by factors other than age." *Id.*

A legitimate reason is not the same as a reasonable factor, given the Court's analysis in *Hazen Paper*. For example, an employer's response to an ADEA disparate treatment claim could be a reason such as race or pension vesting that is unlawful under another statute, but is not unlawful under the ADEA. *Id.* Such a response would not be reasonable because it would subject the employer to liability for other claims.

The reasonableness requirement of the RFOA provision also makes the defense inappropriate as a response to a disparate treatment claim because the disparate treatment theory does not permit inquiry into the "reasonableness," fairness, justness, or propriety of the employer's actions. *See Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 398 (7th Cir. 1998). Under the disparate treatment method of proof, the employer's actions may be unreasonable or unfair or arbitrary, yet not intentionally discriminatory. *See also* L. STEVEN PLATT & CATHY VENTRELL-MONSEES, AGE DISCRIMINATION LITIGATION, § 14.180 (2000).

A "reasonable factor" clearly connotes something more and different than a legitimate factor. The context of the RFOA

suggests that the term "reasonable" imposes a requirement that the factor be related to an individual's ability to do the job.[40/]

The meaning of "reasonable factor" as job-related is reflected by its juxtaposition to the BFOQ defense. Immediately preceding the language "reasonable factors other than age," Congress used the term "*reasonably* necessary" to describe the relationship between a "bona fide occupational qualification" and the "normal operation of the particular business." 29 U.S.C. §623(f)(1). The BFOQ defense focuses on the employee's ability to do the job. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). By following the BFOQ defense, a plausible reading of the term "reasonable factors" would be factors related to the job requirements or job performance given the context of the term within the statute.

The degree of reasonableness would depend on the circumstances of the case. In the BFOQ context, reasonably necessary means the employer is compelled to use age as a proxy for the job-related qualifications. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985). Similarly, Title VII requires that the particular employment practice causing a disparate impact must be job related and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).[41/] The Court has described the employer's response to a disparate impact claim under Title VII as a "*reasonable* measure of job performance." *Griggs v. Duke Power*, 401 U.S. 424, 436 (1971).

[40/] *See* Player, *supra*, note 26, at 840-41.

[41/] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991), added a provision to Title VII, § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i), codifying the job related and business necessity concepts first set forth in *Griggs v. Duke Power*, 401 U.S. 424, 436 (1971).

The absence of the term "necessary" in the RFOA defense implies that the employer is not compelled to use the factors it chose. However, because the employer bears the burden of proving the RFOA defense, allowing any rationale would not justify excusing the violation of § 4(a). Rather, the language and context of the defense suggest an intermediate burden on the employer to demonstrate the reasonableness of its action. The business necessity standard of *Griggs* would be consistent with the RFOA. Proof by the employer of a substantial business purpose for using the factor could establish that the decision was "fair, proper, just, moderate, [or] suitable under the circumstances." BLACK'S, at 1138 (5th ed. 1979).

III. REGULATIONS CONTEMPORANEOUS WITH PASSAGE OF THE ADEA RECOGNIZE THE STATUTE PROHIBITS AGE-NEUTRAL PRACTICES THAT ADVERSELY AFFECT OLDER WORKERS, UNLESS JUSTIFIED AS JOB-RELATED UNDER THE SECTION 4(f)(1) DEFENSE.

Just nine days after the ADEA became effective, the Department of Labor[42/] issued interpretive regulations of the new statute.[43/] Significantly, the ADEA's first regulations were drafted under the leadership of Secretary Wirtz, whose 1965 report to Congress provided the historical documentation for federal legislation prohibiting age discrimination. REPORT OF

[42/] The ADEA as enacted, gave the Secretary of Labor the authority to issue rules or regulations necessary to carry out the statute. 29 U.S.C. § 628 (1968). Enforcement authority over the ADEA was transferred to the EEOC in 1979. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. part 321 (1978), *reprinted in* 5 U.S.C. app. § 1155 (1982).

[43/] 33 Fed. Reg. 9172 (June 21, 1968), codified at 29 C.F.R. §§ 860. 103-04 (1970). *See* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AMER. UNIV. L. REV. 1071, 1104 (1998).

THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, at 8 (JUNE 1965), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16-41 (1965) (Hereinafter cited as the "WIRTZ REPORT "). Secretary Wirtz also led the Johnson Administration's efforts to introduce and pass legislation prohibiting age discrimination in employment. 113 Cong. Rec. 1377 (1967), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 62-63, 68-69 (1965).

The 1968 DOL regulations interpreting ADEA Sections 4(a) and 4(f)(1) are entirely consistent with the statute and its legislative history. Indeed, there are remarkable parallels between the Wirtz Report's findings and recommendations, the statute's prohibitions and defenses, and the 1968 regulations.[44/]

The Wirtz Report found that explicit age limits precluding the hiring of workers above a certain age were the most common and obvious form of age discrimination. WIRTZ REPORT at 6. The Report also identified the existence of several "institutional arrangements that indirectly restrict[ed] the employment of older workers." WIRTZ REPORT at 15. The Report in effect recognized the different forms in which age discrimination appeared: facially discriminatory practices and facially neutral practices.

Specifically, the Report examined the following "institutional arrangements" that operated to restrict the employment of older persons: (1) "arbitrary rules which ignore individual differences," (2) "[p]romotion-from-within-policies," (3) seniority systems, (4) workers' compensation

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[44/] *See* Fentonmiller, *supra*, n. 43, at 1099-1107 (in depth examination of Wirtz Report, development of ADEA's prohibitions and defenses, and 1968 DOL Regulations.)

laws, and (5) private pension, health, and insurance plans. WIRTZ REPORT at 15-17.

In the findings, prohibitions, and defenses in the ADEA, Congress clearly concurred with the findings in the Wirtz Report. Congress' findings, which preface the purposes of the ADEA, parallel the Report's identification of both facially discriminatory and facially neutral practices as the causes of age discrimination:

> the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and *certain otherwise desirable practices may work to the disadvantage of older persons.*

29 U.S.C. § 621(a)(2) (1968) (emphasis added). The latter finding reflected Congress' concern that neutral practices unintentionally discriminated against older workers.

The broad language of the ADEA § 4(a) addresses the findings of the Wirtz Report and Congress by prohibiting not only intentional discrimination, but discrimination that may "adversely affect"[45/] an employee's status as well. *See* 29 U.S.C. § 623(a)(2).

The defenses crafted by Congress align with the types of discrimination and most[46/] of the institutional arrangements

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[45/] The Court has repeatedly cited the identical language in Title VII §703(a)(2), 42 U.S.C. §2000e-2(a)(2) as the source of the disparate impact method of proof. *See Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *General Electric Co. v. Gilbert*, 429 U.S. 137 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971).

[46/] The ADEA does not explicitly deal with the issue of workers' compensation laws which the Wirtz Report mentions as one problematic area. *See* Fentonmiller, *supra*, note 43 at 1102.

detailed in the Wirtz Report.[47] The two original defenses in ADEA § 4(f)(1) correspond to explicit age limits and the first two institutional arrangements identified in the Wirtz Report. Explicit age limits would be unlawful except in narrow circumstances defined by the bona fide occupational defense. 29 U.S.C. §623(f)(1). *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). "Arbitrary rules which ignore[d] individual differences" and "[p]romotion-from-within-policies," WIRTZ REPORT at 15, would be addressed by the second defense in § 4(f)(1), reasonable factors other than age. *See* 29 U.S.C. §623(f)(1).

The two defenses in ADEA § 4(f)(2) address the last two institutional arrangements discussed in the Wirtz Report. To deal with seniority systems and employee benefit plans, Congress designed the defenses in ADEA Section 4(f)(2) to permit certain age discrimination in seniority systems and employee benefit plans only if the systems and plans were bona fide and "not subterfuge[s] to evade the purposes of the Act."[48]

The 1968 DOL regulations reconfirmed that the ADEA and the Wirtz Report covered age-neutral, as well as explicitly age-based policies. The regulations continued the parallelisms between the problems of facially discriminatory and facially

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[47] *Id. See also* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLORIDA L. REV. 229, 295-96 (1990). The specific defenses designed by Congress to correspond to the institutional arrangements detailed in the Wirtz Report negate the argument that Congress chose to deal with facially neutral practices that disadvantaged older workers through "programmatic measure"only, and not through the statute's prohibitions. *See Ellis v. United Air Lines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996).

[48] In 1990, Congress eliminated this latter phrase. Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 103(1) (1990), codified at 29 U.S.C. § 623(f)(2)(B)(i) (2000).

neutral arrangements, and the statutory defenses designed to address these problems. *Compare* 29 C.F.R. § 860.102 (BFOQ) with 29 C.F.R. §§ 860.103-04 (RFOA).

The 1968 DOL regulations expressly recognized that the "reasonable factor other than age" provision established an affirmative defense to claims that age-neutral practices and policies discriminated based on age. *See* 29 U.S.C. §§860.103-04 (1970). The regulations specifically identified the very types of facially neutral practices that have been commonly challenged under the disparate impact method of proof, such as employee tests,[49] physical fitness standards,[50] quantity or quality of production and educational requirements.[51] The regulations emphasized that the "reasonableness" of any factor is to be examined on case-by-case basis, "not on the basis of any general or class concept." 29 C.F.R. § 860.103(d).

Most importantly, the regulations clearly set forth a job-related standard in determining the reasonableness of the factors other than age upon which the employer acted. For example, the regulations explained that "validated employee tests" could fall within the RFOA defense if they were shown to be related to the requirements of the job, were "fair" and "reasonable" and administered in good faith. 29 C.F.R. § 860.104. Similarly, physical fitness standards must be "reasonably necessary for the specific work to be performed," and must be "uniformly and equally applied to all applicants for

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[49] Employee tests were the first facially neutral practice subjected to disparate impact analysis by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[50] *See, e.g., Lanning v. Southeastern Penn. Transp. Authority*, 181 F.3d 478 (3rd Cir. 1999) (physical fitness standards).

[51] Evaluation factors must be "shown to have a valid relationship to job requirements" and must be "applied uniformly to all employees, regardless of age." 29 C.F.R.. § 860.103 (f)(2) (1970).

the particular job category, regardless of age." 29 C.F.R.§103(f)(1)(i) (1970). The regulations' requirements are remarkably similar and prescient to the elements of the employer's defense to disparate impact claims set forth in *Griggs v. Duke Power.*

The 1968 DOL regulations should be given considerable weight in interpreting the ADEA given their issuance so close in time to the implementation of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Further, the regulations are entitled to special deference as the product of the same Secretary and administration that drafted the legislation that became the ADEA, and the same administration that authored the Wirtz Report, which documented the problems of age discrimination in both facially discriminatory and facially neutral practices. *See, e.g., Zubar v. Allen*, 396 U.S. 168, 192 (1969) (departmental interpretation of a statute carries the most weight when specifically interpreted by administrators who participated in its drafting.)

CONCLUSION

For the foregoing reasons, *amicus curiae* NELA urges the Court to reverse the judgment below and to hold that the ADEA permits disparate impact claims with ADEA § 4(f)(1) providing an affirmative defense to such claims.

Respectfully submitted,

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